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FILED
DEC 31 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 560

ARNOLD CONSTABLE CORPORATION,
Petitioner,

v.

EUDOWOOD SHOPPING PLAZA, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITIONER'S PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

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Petitioner respectfully submits this petition for a rehearing upon its petition for certiorari to the Court of Appeals of the State of Maryland following the order of this Court dated December 9, 1968, denying such relief.

In compliance with Supreme Court Rule 58(2), Petitioner submits the following as substantial additional grounds, not previously presented, for the granting of the writ.

Prior Proceedings

At the outset, it must be emphasized that this is not the commonly encountered case of an unsuccessful litigant seeking to reinstate an appeal by escaping or excusing the

consequences of some delinquency or oversight attributable to the *litigant himself*. Here Petitioner has been cast out of court, and denied equal access to and protection of law, solely by the *mistakes and miscarriages of a state's own judicial machinery*. Petitioner (appellant below) fully complied with the appellate rules and procedures of the State of Maryland, but the subsequent errors of the state's judicial machinery have been artificially charged to Petitioner so as to extinguish its rights of appeal.

In its petition and reply brief heretofore filed herein, Petitioner urged that dismissal of its appeal from a $350,000 adverse judgment by the Court of Appeals of Maryland resulted in the denial of equal protection of law and due process of law under the 14th Amendment. The uncontroverted facts show that Petitioner (as required under Maryland law) made timely filing of the record on appeal with the clerk of the lower court in Baltimore City where the *nisi prius* judgment had been rendered.

It was also uncontroverted that the lower court clerk delayed, for reasons of his own convenience, one extra day before transmitting the record to the Court of Appeals at Annapolis, Maryland, and that this delay resulted in exceeding by such one extra day the ninety-day limit fixed for the lodging of such appellate records in the Court of Appeals of Maryland under the Maryland Rules of Procedure. Despite the statutory power of the Maryland Court of Appeals under the State Rules (Rule 825(c), printed at Appendix Page 2a of Petition) to reinstate and entertain any appeal where "the failure to transmit the record was occasioned by the neglect, omission or inability of the clerk of the lower court . . .," the Maryland Court of Appeals granted Respondent's motion to dismiss this appeal for untimely filing, and thereafter refused to reconsider or rescind its order of dismissal (App. Page 5a).

Uncontested by the Respondent was the sworn statement of the clerk of the lower court that the sole reason for the inadvertent one-day delay was his own mistake, misled as he was by the order by the judge of the *same* lower court extending Petitioner's time to transmit the appellate record three days beyond the legal ninety-day limit. Also uncontroverted by Respondent was the further sworn statement by the clerk that Petitioner's counsel made timely compliance with all his requests to furnish the transcripts of the testimony, statements of cost, etc. (App. pp. 6a-7a).

Grounds for Rehearing

Obviously Petitioner stands in this Court as the victim of an unconscionable miscarriage of justice, resulting from mistakes imposed upon Petitioner by Maryland's judicial machinery, and a Draconian application by the Maryland Court of Appeals of the State Rules of Procedure. A rehearing is respectfully requested in the light of this Court's decision in *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) where this Court (citing *United States v. Ohio Power Co.*, 353 U.S. 98 (1957)), held that it would disregard, and indeed reject the absolute language of Supreme Court Rule 58(4) (to the effect that successive petitions for rehearings will not be received), when fundamental justice required a holding to the contrary. In *Gondeck* this Court concluded that the interests of basic fairness and justice must take precedence over "the strict application of our Rule," and after a prior denial of certiorari, and outright dismissal of a first petition for rehearing, granted plaintiff's second rehearing petition, and thereupon reversed the lower court.

Rehearing is also sought in view of this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 392 U.S. 657, 88

S. Ct. 2279 (1968), where this Court swept aside the holding of the Supreme Court of Appeals of Virginia (which had dismissed an appeal on the technical grounds that it had not been fully perfected under state rules) because the important constitutional rights announced in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186 (1968), had been left unconsidered by the state court. In directing the Supreme Court of Virginia to entertain that appeal on the merits, this Court manifested its fundamental view that substantial justice and constitutional rights are not to be strangled in a web of procedural considerations which defeats substantial justice. The later recalcitrance of the Virginia Court of Appeals in moving to a consideration of the merits, reported at 163 S.E. 2d 588 (Oct. 14, 1968) scarcely vitiates this salutary rule. No similar repudiation of this Court's mandate, if it should reverse and remand this case, could be anticipated herein, since the very constitutional principle at stake is the state court's refusal to hear the within appeal on its merits.

The instant petition for rehearing invokes a similar appeal to fundamental criteria of fairness and substantial justice, as deserving of decisive weight against the rigid adherence to technical formalism herein by the Maryland Court of Appeals. Surely if an explicit rule of this high Court must bow to fundamental requirements of fairness and substantial justice, a state procedural rule casting Petitioner out of court, which was discriminatorily applied to Petitioner, must also (as in *Sullivan v. Little Hunting Park, Inc., supra*) yield to the same compelling demands. As this Court so aptly stated in *Hormel v. Helvering*, 312 U.S. 552, 557 (1941):

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

Unfortunately, this case stands presently as a monument to precisely the opposite philosophy. Petitioner and its constitutional rights have thus far been wholly sacrificed to the grimmest and most rigid application of the Maryland Rules of Procedure pertaining to appeals. The total dismissal of Petitioner's appeal to the Court of Appeals of Maryland is all the more shocking in view of the circumstance that such dismissal resulted from errors and miscarriages entirely and solely within the control of the judicial establishment of the State of Maryland, and that Petitioner and its Maryland counsel fully complied with those rules, except insofar as compliance was frustrated by the judicial establishment.

The Federal courts have been alert to redress an inflexible and literal application of the Federal Rules of Civil Procedure if an injustice thereby results. See, *e.g. Steinberg v. Indemnity Insurance Company of America*, 36 F.R.D. 253 (E.D. La., 1964). And as Justice Cardozo wrote over fifty years ago before joining this high Tribunal, and then still a member of the highest court of New York State:

> "The law has outgrown its primitive state of formalism when the precise word was the sovereign talisman, and every slip was fatal." *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917).

The tragic irony presented half a century later by the case at bar is that the slips (and slip-ups) of Maryland's own judicial machinery have proven "fatal" to Petitioner, not through any fault of its own. Yet the highest Maryland Court, with what can only be viewed as endorsement of a primitive legal fiction, has thus far closed the courthouse doors to Petitioner's appeal, in disregard of Petitioner's constitutional rights.

Such an outcome of this action is surely not to be countenanced today, in what is universally regarded as a more enlightened era of the law.

Conclusion

For the foregoing reasons, the within petition for a rehearing should be in all respects granted, and the writ of certiorari should issue.

Respectfully submitted,

NORMAN P. RAMSEY,
Counsel for Petitioner.

Dated: December 31, 1968.

CERTIFICATION OF COUNSEL

State of Maryland, City of Baltimore, to wit:

I, the undersigned, counsel to Petitioner in the above-captioned cause, duly certify in accordance with Supreme Court Rule 58(2), that this Petition for Rehearing is presented in good faith and not for delay, and I further certify that the within Petition is restricted to substantial grounds available to Petitioner not previously presented in this Court.

NORMAN P. RAMSEY,
Counsel for Petitioner.